92-2019

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

CONSOLIDATED CHEMICAL WORKS, Petitioner,

and

GUADALUPE VARELA, Petitioner,

v.

LENARD MARCUS, Respondent,

and

PEOPLES GAS, LIGHT AND COKE COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JOHN D. GORBY
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Chicago, IL 60604
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13 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Illinois Appellate Court's denial on jurisdictional grounds of a hearing on receipt of service by mail of a notice of appeal deprived appellee Consolidated of its property interests without due process under the 14th Amendment, when 1) the time period for appellee to file a cross-appeal is 10 days after service on appellee of appellant's notice of appeal, 2) Illinois Supreme Court Rules place on appellant the sole responsibility for serving appellee with the notice of appeal, 3) appellant has an economic interest in not serving appellee, and 4) appellee claims it was never served with the notice of appeal, was ignorant of the pending appeal and had no reasonable alternative means of learning about the pending appeal until after the period for filing a cross-appeal had expired.

II. Whether the Illinois Appellate Court's refusal on jurisdictional grounds to conduct a hearing on service of a notice of appeal, which service extends for 10 days appellee's right to file a cross-appeal, denied appellee Consolidated equal protection of the laws, when under Illinois law an affidavit of service by mail only creates

a rebuttable presumption of receipt of service, when, upon denial of service at the trial level, a hearing on service would have been held.

III. Whether the Illinois Supreme Court deprived Consolidated of its right under the Due Process Clause of the 14th Amendment to an appellate review of a judicial decision when it denied Consolidated's petition for leave to appeal an issue which arose originally in the Appellate Court, which involved a serious question of law and fact, and which terminated Consolidated's right to cross-appeal, when Illinois law provides no other procedure for an appellate review of that decision.

IV. Whether the Illinois Supreme Court denied Consolidated equal protection of the laws by refusing to grant an appellate review of a decision of the Appellate Court which involved serious questions of law and fact and which resulted in a dismissal of Consolidated's cross-appeal on jurisdictional grounds, when the Illinois Constitution, Illinois Supreme Court Rules and actual practice provide for a right to appeal from all final judgments.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

1. Plaintiff/Appellant and Cross-Appellee: Peoples Gas Light and Coke Company

2. Defendant: Guadalupe Varela

3. Garnishee-Defendant/Appellee and Cross-Appellant: Consolidated Chemical Works, Incorporated

4. Sanctioned Attorney/Appellant and Cross-Appellee: Lenard Marcus

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The opinion (slip opinion) of the Appellate Court of Illinois, First District, not reported, appears in the Appendix hereto. No opinion was rendered by the Appellate Court of Illinois upon denial of Consolidated's Petition for Rehearing. The Appellate Court's order denying the Petition for Rehearing appears in the Appendix hereto. No opinion was rendered by the Illinois Supreme Court upon denial of Consolidated's Petition To The Illinois Supreme Court For Leave To Appeal As A Matter Of Right Or Alternatively For Leave To Appeal. The Illinois Supreme Court's order denying

Consolidated's Petition for Leave to Appeal appears in the Appendix hereto.

JURISDICTION OF THIS COURT

The judgment of the Appellate Court of Illinois was entered on September 24, 1992. The Appellate Court denied Consolidated's Petition for Rehearing on December 2, 1992. The Illinois Supreme Court denied Consolidated's Petition For Leave To Appeal on March 31, 1993. This Petition for a Writ Of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND COURT RULES INVOLVED

1. Constitutional Provisions Involved:

-- Fourteenth Amendment to the United States Constitution:

"... nor shall any State deprive any person of life, liberty, or property, without due process

or law; nor deny to any person within its jurisdiction the equal protection of the laws."

-- Article 6, §4, Supreme Court-Jurisdiction, of the Illinois Constitution of 1970 (ch. 1, Ill.Rev.Stat. 1991):

"(c) Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court ..."

-- Article 6, §6, Appellate Court-Jurisdiction, of the Illinois Constitution of 1970 (ch. 1, Ill.Rev.Stat. 1991):

" Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court ..."

2. Statutory Provisions Involved:

-- §12-817, Wrongful issuance of summons, of the Illinois Wage Deduction Act, ch. 110, Ill.Rev.Stat. 1991:

"Wrongful issuance of summons. If any person wrongfully causes summons to issue for

a deduction order, he or she shall be liable to the employee and the employer for all damages occasioned by such action including reasonable attorney's fees, which damages or attorney's fees may be proved in the same action in which the summons was wrongfully issued."

3. Illinois Supreme Court Rules Involved (ch. 110A, Ill.Rev.Stat. 1991):

-- Rule 11, Manner of Serving Papers Other Than Process and Complaint on Parties Not in Default in the Trial and Reviewing Courts:

"(a) On Whom Made. If a party is represented by an attorney of record, service shall be made upon the attorney. ...

(b) Method. Papers shall be served as follows: ... (3) by depositing them in a United States post office or post-office box, enclosed in an envelope, plainly addressed to the attorney at his business address ... with postage fully prepaid."

-- Rule 12, Proof of Service in the Trial and Reviewing Courts - Effective Date of Service by Mail:

"(a) Filing. When service of a paper is required, proof of service shall be filed with the clerk.

(b) Manner of Proof. Service is proved: ...

(3) in the case of service by mail, by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the paper in the mail, stating the time and place of mailing, the complete address which appeared on the envelope, and the fact that proper postage was prepaid.

(c) Effective Date of Service by Mail. Service by mail is complete four days after mailing."

-- Rule 301, Method of Review:

"Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding. ..."

-- Rule 303. Appeals from Final Judgments of the Circuit Court in Civil Cases.

"(a) Time; Filing; Transmission of Copy.

(1) ... the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from ...

(3) If a timely notice of appeal is filed and served by a party, any other party, within 10 days after service upon him, or within 30 days of the enter of the order deposing of the last pending post-trial motion, whichever is later, may join in the appeal, appeal separately, or cross-appeal by filing a notice of appeal, indicating which type of appeal is being taken.

(e) Extension of Time in Certain Circumstances. On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and the $25 filing fee, filed in the reviewing court within 30 days after expiration of the time for filing a notice of

appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing.

(g) Docketing Statement; Filing Fee. Within 14 days after the filing of a notice of appeal the appellant shall file with clerk of the reviewing court a docketing statement ..."

STATEMENT OF THE CASE

This dispute arose out of a wrongful issuance of a wage deduction summons by plaintiff Peoples Gas to garnishee-defendant Consolidated following the entry of a default judgment against Consolidated's employee, defendant Guadalupe Varela, for an unpaid gas bill. The Illinois circuit court (trial court) found that Peoples Gas and its attorney Lenard Marcus wrongfully issued the wage deduction summons and, pursuant to the Illinois Wage Deductions Act (ch. 110, §12-817, Wrongful issuance, Ill.Rev.Stat. 1991), awarded $1000 in damages to Consolidated. Peoples Gas and

Marcus appealed unsuccessfully this decision to the Appellate Court of Illinois. Subsequently, Consolidated sought in the circuit court $16,950 in attorney's fees for appellate and post-appeal legal work. The circuit court awarded only $6500 in damages to Consolidated and against Marcus on November 19, 1990.[1] On December

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[1] Prior to the time the trial court rendered its judgment in November 1990, Consolidated had decided to accept the trial court's judgment and bring this case to an end. Consolidated had also decided that, if Peoples Gas or Marcus appealed and the trial court's award of attorney's fees to Consolidated is inadequate, Consolidated would file a cross-appeal under Illinois Supreme Court Rule 303(a)(3). As reported in the accompanying text, Marcus did appeal but neither Consolidated nor its attorney John Gorby received service of the notice of appeal. When Consolidated eventually learned of Marcus' pending appeal, Consolidated moved to file a late notice of cross-appeal, which the Appellate Court denied. Consolidated then moved for reconsideration, which a three-judge panel of the Appellate Court allowed. Marcus then filed an unusual motion in which he offered to dismiss his appeal if the Court would strike Consolidated's cross-appeal. After an exchange of written arguments, the Appellate Court denied this motion. Several months later, Marcus voluntarily dismissed his appeal, but he has not, at the time of this writing, paid the judgment. By this point, Consolidated had invested considerable time, research, effort and money into filing and maintaining a cross-appeal, which raises important issues concerning the award of attorney's fees in "wrongful issuance of wage deduction"- cases for work done in defending that award in the appellate

19, 1990, Marcus appealed this decision by supposedly filing a notice of appeal in the circuit court.

According to the Illinois appellate court scheme, a party has thirty days after final judgment in the circuit court to file a notice of appeal (S.Ct.Rule 303(a)(1), ch. 110A, Ill.Rev.Stat. 1991) and "any other party" has an additional ten days "after service [of the notice of appeal] upon him" to file a notice of cross-appeal. S.Ct.Rule 303(a)(3), Time; Filing; Transmission of Copy, ch. 110A, Ill.Rev.Stat. 1991. Illinois appellate procedure provides for a grace period, specifically on "a showing of reasonable excuse for failure to file a notice of appeal on time ... filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal ..." S.Ct.Rule 303(e), Extension of Time in Certain Circumstances, ch.

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courts. For these reasons, Consolidated decided to continue to prosecute its cross-appeal.

110A, Ill.Rev.Stat. 1991. Importantly for this case, the appealing party has the sole responsibility for "serv[ing] ... a copy of the notice of appeal and date of filing upon every other party ..." S.Ct.Rule 303(d), Service of Notice of Appeal, ch. 110A, Ill.Rev.Stat. 1991.

In this case, Marcus appears to have filed a notice of appeal in the circuit court on December 19, 1990. But Consolidated never received any notice of this filing and knew nothing of the pending appeal until some 55 days later on February 11, 1991, when Consolidated received notice of routine motion to extend time to file the record on appeal. This 55 day period exceeds the "grace" period contemplated by Supreme Court Rule 303(e) by 16 days. Consolidated went immediately to the circuit court clerks office to check out the court file to see if a notice of appeal had been filed but the file was missing and still has not been found. Consolidated also utilized "Court Access PLUS," a computer service which tracks and

accesses the circuit court's computerized records. Court Access PLUS, however, gives no indication of Marcus' filing of a notice of appeal. In short, there was no usual and normal way Consolidated could have learned of the filing of the notice of appeal within the period established by Supreme Court Rule for filing a cross-appeal.

Within eight days of learning of the existence of Marcus' appeal, Consolidated moved the Appellate Court for leave to file a notice of cross-appeal or, alternatively, to strike Marcus' appeal for failing to serve the notice of appeal on Consolidated. The Appellate Court denied this motion on jurisdictional grounds. On March 7, 1991, Consolidated filed a motion for reconsideration of this denial. A three judge panel of the Appellate Court allowed this motion, and Consolidated was granted leave to file its Notice of Cross-Appeal. Four months later Marcus, on his own motion, dismissed voluntarily his

appeal. Consolidated however persisted in its appeal. On September 24, 1992, the Appellate Court, after receiving briefs on the merits and hearing oral arguments on the merits, changed its position on its jurisdiction over Consolidated's cross-appeal for the second time, holding that it had no jurisdiction over Consolidated's cross-appeal and dismissed the cross-appeal. The decisive language of the Appellate Court is:

The notice of appeal is accompanied by a notarized proof of service indicating that Gorby was served by mail on that same day. Supreme Court Rules 303(d) and 11 provide that a notice of appeal may be served by mail and that service by mail is complete four days after mailing. Thus, service on Gorby was complete on December 23, 1990. ... Based upon the Supreme Court Rules and this court's holding in Henkhaus, it is our opinion that we lack jurisdiction over Consolidated's cross-appeal.
Slip Opinion, at 5, 6.

Shortly thereafter Consolidated filed a Petition for Rehearing in which it elaborated on the federal due process and equal protection

issues implicated in a dismissal of the cross-appeal on jurisdictional grounds. The Appellate Court denied this petition on December 2, 1992, without opinion. Because these federal and state constitutional issues arose for the first time in the Appellate Court, Consolidated petitioned the Illinois Supreme Court for leave to appeal as a matter of right[2] (see Art. 6, §4(c), Ill.Const. 1970, Ill.Rev.Stat. 1991) and, alternatively, for leave to appeal. The Illinois Supreme Court denied this petition

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[2] Article 6, §4(c), Supreme Court Jurisdiction, of the Illinois Constitution of 1970 provides that "[a]ppeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. ..." In this case, these two criteria were unquestionably met. Indeed, since the time limitation rules (S.Ct.Rule 303) of the Illinois Supreme Court Rules restrict appellate court jurisdiction as defined in Art. 6, §6, of the Illinois Constitution, there was, in addition to the federal questions, a serious Illinois constitutional question which arose "for the first time in and as a result of the action of the Appellate Court." Yet, in spite of this clear language and uncontested facts, the Illinois Supreme Court denied Consolidated's Petition for Leave to Appeal as a Matter of Right without opinion or comment. Consolidated does not understand how that court reached that result.

on March 31, 1993, the effect of which was to deny Consolidated any judicial review of the Appellate Court's decision that it was without jurisdiction to hold a hearing on the question of service on Consolidated of Marcus' notice of appeal and thus, also by implication, Consolidated's cross-appeal.

STAGE OF PROCEEDINGS IN WHICH FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED

The federal due process and equal protection questions sought to be reviewed were first raised in the Appellate Court of Illinois upon the first denial of Consolidated's motion for leave to file a late notice of cross-appeal, upon the Appellate Court's dismissal of Consolidated's cross-appeal for want of jurisdiction without affording Consolidated a factual hearing on the question of service of Marcus' notice of appeal on Consolidated, an act which gives an appellee 10 days within which to file a cross-appeal, and upon denial by the

Appellate Court of Consolidated's Motion in the Appellate Court for Rehearing. The Illinois Supreme Court elected not to review the judgment of the Appellate Court.

REASONS FOR GRANTING THE WRIT

I

Introduction

This case bears striking and disturbing similarities to Logan v. Zimmerman Brush, 455 U.S. 422 (1982).[3] Indeed, one is tempted to

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[3] In Logan this Court clarified the Due Process Clause as it relates to state jurisdictional limitations on a party's right to assert rights protected by state law. Under the statutory law (Illinois Fair Employment Act) of the State of Illinois, Logan, a handicapped person, is entitled to relief if he was unlawfully discharged from his employment because of a physical handicap unrelated to ability. He filed a charge for unlawful termination under the statute with the Illinois Fair Employment Commission. The Fair Employment Practices Act gave the Commission 120 days within which to convene a factual hearing to obtain evidence and explore the possibility of a settlement. Through inadvertence, the Commission scheduled the fact finding conference five days after the expiration of the 120 day statutory period. On appeal the Illinois Supreme Court held that the Commission's failure to comply with the 120 day convening requirement deprived the Commission of "jurisdiction" to consider Logan's charge. This Court concluded that Logan was deprived of property interests protected by the Due Process Clause of the Fourteenth Amendment. Specifically, this Court held

conclude that, in spite of this Court's effort to "[t]o put it as plainly as possible" (Logan, at 434), the Illinois judicial system still has not grasped the significance and impact of Logan on its jurisdictional and procedural scheme. Put differently, Illinois still has not gotten the message. The Illinois Appellate Court has decided this case in a manner which conflicts with due process as explained by this Court in the Logan decision and its line of cases. The Appellate Court decision is also incompatible with equal protection as expressed by four members of this Court in Logan. The decision of the Illinois Supreme Court to deny leave to appeal left Consolidated without any appellate review of a judicial decision which deprived Consolidated of property interests protected by

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that Logan had a right to use the State's adjudicatory procedures to obtain relief for a violation of his rights under State law and that the Illinois Supreme Court's termination of the case on jurisdictional grounds deprived Logan of "an opportunity ... granted at a meaningful time and a meaningful manner ... for a hearing appropriate to the nature of the case." Logan, at 435-37.

the 14th Amendment. It also denied Consolidated equal protection in a state where appeal is a matter of right. Perhaps the explanation for the Illinois courts action in this case is that Logan is unclear, a matter which Consolidated rejects. But regardless of whether the Illinois courts are ignoring or misunderstanding Logan, this case raises questions which should be settled by this Court. U.S. S.Ct. Rule 10, Considerations Governing Review on Writ of Certiorari, Part III, Jurisdiction of Writ of Certiorari, 28 U.S.C.A.

Because the violations of Consolidated's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment occurred within a much more complex procedural context then in Logan, it may be helpful at the outset, before embarking further on the reasons for granting a writ of certiorari, to identify the exact chronological and procedural point of constitutional violation.

1. The Appellate Court of Illinois deprived Consolidated of its right to due process when it dismissed Consolidated's cross-appeal for want of jurisdiction without convening a hearing on service on Consolidated of Marcus' notice of appeal, an act which, under Illinois law, provides Consolidated 10 days within which to file a cross-appeal.

2. The Appellate Court denied Consolidated equal protection of the laws by refusing to give Consolidated a hearing on the issue of service on Consolidated of Marcus' notice of appeal, when, according to established Illinois law, a hearing is held when a party denies receipt of service by mail.

3. The Supreme Court of Illinois violated Consolidated's due process right to appeal upon denying Consolidated's Petition for Leave to Appeal, thereby leaving the Appellate Court's decision unreviewed and unreviewable.

4. The Supreme Court of Illinois denied Consolidated equal protection of the laws when

it denied Consolidated's Petition for Leave to Appeal and when, under Illinois law, every party to a law suit has a right to appeal from a final judgment.

I I

The Appellate Court Deprived Consolidated Of Due Process Of Law Upon Dismissing Consolidated's Cross-Appeal For Want Of Jurisdiction Without Holding A Hearing On Service Of Marcus' Notice Of Appeal On Consolidated.

To illustrate the nature and degree of constitutional infraction, Consolidated will analyze this case along the lines employed by this Court in Logan, which began by quoting Justice Robert Jackson:

> **Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.** Logan, at 428.

A. Consolidated Has Protected Property Interests Under Illinois Substantive Law.

Section 12-817, Wrongful issuance, of the Illinois Wage Deduction Act (ch. 110, Code Civ. Proc. §12-800 et seq . , Ill.Rev.Stat. 1991), provides relief for employers who are damaged by a wrongful issuance of a wage deduction summons. Specifically, the employer is entitled to recover for "all damages occasioned by such [wrongful issuance] action including reasonable attorney's fees." A cause of action, including a state tort claim, is a species of property protected by the Fourteenth Amendment's Due Process Clause. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Martinez v. California, 444 U.S. 277, 281-282 (1980); Logan, at 428. Thus, like the situation in Logan, Consolidated has a substantive right to relief grounded in Illinois law.

B. Consolidated Has A Right Under The Due Process Clause To Use The State's Adjudicatory and Appellate Procedures.

Because Consolidated has a legal right based on state law, Consolidated also has a corresponding right to use established state adjudicatory procedures. Boddie v. Connecticut, 401 U.S. 371, 380 (1971); Logan, at 430.

The procedural scheme contemplated by the Illinois Wage Deduction Act permits an employer injured by a wrongful issuance to "prove [these damages] in the same action in which the summons was wrongfully issued." §12-817. Consolidated followed this procedure and demanded and proved $16,900 damages caused by the wrongful issuance. The trial court awarded Consolidated $6,500 against Marcus, attorney for Peoples Gas, less that half of the amount demanded and proved.

The established adjudicatory procedures of the State of Illinois also include a right to appeal a final judgment of a circuit court. Ill. Const. Art. 6 §4; Ill. S.Ct.Rule 301. One of the

methods of instituting an appeal under the Illinois appellate/procedural scheme is as follows: a party to a suit may "cross-appeal" a final judgment of a circuit court within 10 days after being served by the appealing party with a copy of the notice of appeal. Ill. S.Ct.Rule 303(a)(3), ch. 110A, Ill.Rev.Stat. 1991 As pointed out above in the "Statement of the Case," Marcus supposedly filed a notice of appeal in the circuit clerk's office and claims to have mailed a copy of that notice to Consolidated's attorney John Gorby.

But of crucial importance to this case, Consolidated never received service of that notice of appeal. When Consolidated eventually learned of Marcus' pending appeal, some 55 days after Marcus had supposedly served Consolidated, the time limitation contemplated by Illinois Supreme Court Rule 303(a)(3) and (d) for filing a cross-appeal had expired. Rejecting Consolidated's effort to file a late notice of cross-appeal, the Appellate Court

held that Consolidated's attorney John Gorby had been "served" on December 23, 1990. This holding was based on the Appellate Court's interpretation of Illinois Supreme Court Rules 11, 12 and 303(d) and on the affidavit of Christine Neal, the secretary of attorney representing Marcus. The Appellate Court wrote:

The notice of appeal is accompanied by a notarized proof of service indicating that Gorby was served by mail on that same day. Supreme Court Rules 303(d) and 11 provide that a notice of appeal may be served by mail and that service by mail is complete four days after mailing. Thus, service on Gorby was complete on December 23, 1990. ... Based upon the Supreme Court Rules and this court's holding in Henkhaus, it is our opinion that we lack jurisdiction over Consolidated's cross-appeal.
Slip Opinion, at 5, 6.

Thus, the Illinois Appellate Court, like the Illinois Supreme Court in Logan, dismissed the matter "for lack of jurisdiction." Slip Opinion, at 6. In short, the Illinois Appellate Court, like

the Illinois Supreme Court in Logan, refused to hear a claim for relief on the merits because, due to procedural tardiness, it had no jurisdiction.

C. The Illinois Courts' Improper Use Of Jurisdictional Concepts In Procedural "Tardiness" Cases Causes Federal Due Process Violations By Precluding Hearings On Questions Of Law And Fact.

Contributing significantly to the due process problem in both Logan and in this case is the wide-spread use by Illinois courts of the concept of jurisdiction as the reason for dismissing cases which are filed after the procedural time limitations set by court rules. Jurisdiction, of course, has to do with the power of a court to act or, in this case, to hold a factual hearing in a case. See James, Civil Procedure §12.1. If a court has no "jurisdiction," it has no choice but to "enter an order of dismissal," as the Appellate Court did here. As Justice Chase wrote in Ex Parte McCardle:

Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.
McCardle, 7 Wall. (74 U.S.) 19 (1869)

By employing the concept of jurisdiction in "tardiness" cases, as was done in Logan and in this case, the Illinois courts need only to "announc[e] the fact [of no jurisdiction] and dismiss the cause." This is a most unfortunate approach, because the effect of applying jurisdictional concepts in the case of lateness in scheduling a conference, as in Logan, or of lateness in filing a notice of cross-appeal, as here, is far-reaching and results in due process violations. This, of course, is not to suggest that the state may not create reasonable procedural requirements or require timely filings. See Logan, at 434, n.7, & 437. Illinois' problem, however, is that it uses jurisdictional principles

to deal with procedural problems.[4] This approach, in cases like Logan and this case, results in serious procedural due process violations, because, if a court lacks "jurisdiction," it must "acknowledge the fact and dismiss the cause," which precludes the holding of a hearing as required by the federal Due Process Clause. In other words, the Illinois Appellate Court said in effect, we do not have jurisdiction to hold a procedural hearing to decide if we have jurisdiction.

This case presents a striking example of the problem. Marcus claims he served Consolidated by mail with a copy of the notice of appeal, an legal act which would trigger the

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[4] Consolidated does not claim that Illinois may not have jurisdictional rules. Rather, the complaint here is that, if the Court's jurisdiction is based on a time factor, such as timely scheduling, as in Logan, or timely filing, as here, Consolidated is entitled to a hearing to determine if the reasons for a late filing are reasonable under the circumstances. This is particularly necessary when, as here, the responsibility for service of notification of the pending appeal, and thus the opportunity to file a timely cross-appeal, is placed in the hands of the adversial opponent. See text Part II, E, below.

10 day period for Consolidated to file a cross-appeal. Consolidated denied receiving Marcus' notice of appeal and demanded a hearing, which Illinois law appears to require, to resolve the issue of service on Consolidated. The Illinois Appellate Court, the first court to deal with this problem and thus acting as a functional equivalent of a trial court, simply held, because of late filing, it had no jurisdiction over the matter and was compelled to dismiss the appeal. This decision deprived Consolidated of its procedural due process right to a hearing in a manner which adversely affects its property interests.

If the Illinois Appellate Court would have dealt with the late filing of the notice of cross-appeal as a procedural, as opposed to a jurisdictional, matter, it would have enjoyed the power to hold a hearing to determine whether Marcus' notice of appeal had been "serve[d] upon" Consolidated, as required by Illinois Supreme Court Rule 303(a)(3), and

whether Consolidated's failure to file a cross-appeal within the 10 day period contemplated by Rule 303(a)(3) was reasonable.

If the Appellate Court would have held a hearing, Consolidated would have offered persuasive proof that it did not receive service of Marcus' notice of appeal.[5] At a minimum

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[5] Had a hearing been held, Consolidated would have proved the following: 1) Consolidated's attorney John Gorby would have testified a) that he did not receive service, in spite of the fact that he looked every day for such a notice; b) that Consolidated also did not receive a copy of Marcus' docketing statement, which must be filed within 14 days after filing the notice of appeal (Sup.Ct.Rule 303(g)) and served on appellee and which would have given Consolidated notice of Marcus' pending appeal and the opportunity to file a late notice of cross-appeal under Supreme Court Rule 303(e), Extension of Time in Certain Circumstances; c) that Consolidated first learned of Marcus' pending appeal 55 days after his notice of appeal was supposedly filed; and, d) that the case file was missing from the Circuit Court Clerk's office and, even after a diligent search, could not be found by the clerks. 2) Consolidated would have also proved a) that the computer records in the Clerks' office and on Court Access PLUS show no entry for Marcus' filing of the notice of appeal; b) that the case involved a sanction against Marcus for wrongful issuance of a wage deduction summons; c) that Marcus had a significant interest in appealing the $6500 judgment against him and avoiding a cross-appeal which could result in an additional $10,000 judgment against him plus attorney's fees; and d) that Marcus' attorney Mark Miller is the brother of David Miller, managing

these facts would provide sufficient evidence to rebut any presumption of receipt of service by mail, if not to establish by a preponderance that Consolidated never received service. These facts also show that Consolidated acted reasonably and diligently by filing its motion to file a late notice of cross-appeal within 9 days of learning of Marcus' pending appeal. The main point is this: if the Appellate Court would have dealt with the late filing as a procedural, as opposed to a jurisdictional, matter, it would have had the power and authority to hold a hearing to determine if Consolidated had been diligent in protecting its property interests with a cross-appeal, as contemplated by Illinois appellate/ procedural law. The Appellate Court's jurisdictional approach, however, precluded the possibility of a hearing. It thus follows that the Appellate Court violated

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partner of Baker & Miller, the small collections law firm for whom Marcus works.

Consolidated's right to a hearing under the Due Process Clause to protect its property interests.

As the matter was actually handled, the Illinois Appellate Court simply concluded that it had no power to hold a factual hearing on service. Such an inflexible approach deprives Consolidated of an "opportunity for hearing appropriate to the nature of the case" (Mullane, at 313; Logan, at 428), of an "opportunity for a hearing on the merits of his cause" (Societe` Internationale v. Rogers, 357 U.S. 197, 209 (1958); Logan, at 429), of the "use of established adjudicatory procedures [which is] the equivalent of denying them an opportunity to be heard upon their claimed right[s]" (Boddie v. Connecticut, 401 U.S. 371, 380 (1971); Logan, at 430). Since there is a factual dispute about service, there is a right to a factual hearing. Codd v. Velger, 429 U.S. 624 (1977) (per curiam).

D. The Illinois Appellate/Procedural Scheme Which Places The Responsibility

For Service Of A Notice Of Appeal On An Interested Opponent Coupled With The Appellate Court's Use of Jurisdictional Concepts To Deal With A Late Filing Of Cross-Appeals Violates Due Process.

The due process problem set forth here is aggravated immeasurably by the appellate/ procedural scheme envisaged by Illinois Supreme Court Rules 11, 12 and 303(a)(3), which places the responsibility for service of the notice of cross-appeal on the opponent and adversary. Thus, in specific relation to this case, the opportunity for Consolidated to respond in a timely manner to Marcus' appeal by filing a cross-appeal is entrusted to the good faith of its adversial opponent. In other words, Consolidated's protected property interests are dependent upon the enemy camp acting in good faith.

This is not the procedure in the Federal Courts[6] and in many of the States, where the

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[6] Federal Appeal Rule 3(d), Service of Notice of Appeal, provides: "The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each

clerk of the trial court is required to transmit copies of the notice of appeal to the other parties by mailing them either to counsel or to a party not represented by counsel. See Stern, Appellate Practice in the United States, at 85. Stern writes that the explanation for this "may be historical." He continues:

> **Appeals ... were regarded as new actions in the appellate court, so that the initial document [notice of appeal in this case] was regarded as having the status of a summons in a case filed in the trial court. Summons and complaints are customarily served upon defendants by the sheriff or marshal in the belief that this provides greater assurance that the defendants will actually receive the papers ...**
> Stern, at 85, n. 8.

This Court has found that procedures which place the burden of fairness on the adversary are naive and likely to violate due process. For example, this Court has strictly enforced the

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party other than the appellant ...", 28 U.S.C.A. Title II, Appeals From Judgments And Orders Of District Courts.

right under the Due Process Clause to "a fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). It is constitutionally unacceptable for a decision-maker to have a personal interest in the outcome of the adjudication. Gibson v. Berryhill, 411 U.S. 564 579 (1973); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). If, in this case, the Illinois Appellate Court would have held a hearing on actual service on Consolidated, as would presumably have occurred in a trial court, convenience could arguably justify placing the responsibility for service on the opponent. But, in this case, the Illinois appellate/procedural scheme placed the burden of service on the opponent and, upon a claim that service was not received and a request made for a hearing on service, the Appellate Court refused a hearing because of lack of jurisdiction and dismissed the cross-appeal. This combination of placing the burden of service on the

opponent and a tough and inflexible jurisdictional approach violates fundamental principles of fairness required by due process.

Considering the "jurisdictional" consequences of a late filing in Illinois law, the appellate/procedural scheme placed in question here is the functional equivalent of a judicial system which places the responsibility for the service of process to commence a suit on the complaining party, as opposed to the sheriff or a neutral private process server. In fact, the situation presented here is worse, because, in most fair legal systems, upon entry of a default judgment against the defendant and a later claim by defendant that he was not served with process and thus had no notice, a hearing on service is held. Seen in this light, it is hard to imagine a more blatant violation of procedural due process. Yet that is precisely what the Illinois Appellate Court has done in this case. It is a procedural mess, very

vulnerable to abuse, which ought to be reviewed by this Court.

E. If The Basis Of The Appellate Court's Decision Is Not Lack Of Jurisdiction But Rather A Belief That The Illinois Procedural Scheme, Specifically Supreme Court Rule 12, Creates An Irrebuttable Presumption Of Service Upon Production Of A Sworn Statement Of Mailing, Consolidated's Due Process Rights Have Been Violated Because An Irrebuttable Presumption Also Deprives Consolidated Of A Fair Hearing On Service.

Another possible explanation for the Appellate Court's conclusion that "service upon Gorby was complete on December 23, 1990" (Slip Opinion at 5) is that the Appellate Court believes, as a matter of Illinois law, that service is complete, in a conclusive sense, four days after an affiant swears that a properly addressed and prepaid envelope containing the notice was deposited in the U.S. Mail. See Slip Opinion at 5, 6. The Appellate Court does not explicitly say this. Yet it is a plausible

explanation for its decision, particularly in light of the exact language of Illinois Supreme Court Rule 12, which provides: "Service is proved ... in case of service of mail ... by affidavit [of mailing] ..." If this is what the Appellate Court has done, it has based its holding on a irrebuttable presumption, a doctrine which raises a different, but not less important, set of federal constitutional due process and equal protection problems. See, e.g. Vlandis v. Kline, 412 U.S. 441, 446 (1973), where this Court pointed out that statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments. See also Cleveland Bd of Education v. LaFleur, 414 U.S. 632 (1974); Turner v. Department of Employment Sec., 423 U.S. 44 (1975). There is also considerable academic commentary on irrebuttable presumptions.[7]

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[7] See, e.g., Bezanson, Some Thoughts on the Emerging Irrebuttable Presumption Doctrine, 7 Ind.L.Rev. 644 (1974); Nowak, Realigning the Standards of Review

It is fair to conclude that, however one explains the Illinois Appellate Court's decision to dismiss Consolidated's cross-appeal without even a hearing on service of Marcus' notice of appeal on Consolidated, whether on jurisdictional grounds because of late filing or on irrebuttable presumption of service grounds, the Illinois Appellate Court's decision is incompatible with minimal procedural requirements and fairness required by the Due Process Clause of the United States Constitution.

F. The Due Process Problem In This Case Is More Aggravated Than In Logan Because The Illinois Judiciary Is Immune From Suit And Thus There Can Be No Post-Deprivation Hearing.

In Logan one of the issues was whether a "post-deprivation" hearing in the form of a civil

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under the Equal Protection Guarantee - Prohibited, Neutral and Permissive Classifications, 62 Georgetown L.J. 1071, 1104-09 (1974); Note, Irrebuttable Presumptions as a Alternative to Strict Scrutiny: from Rodriquez to LaFleur, 62 Georgetown L.J. 1173 (1974); Note, The Irrebuttal Presumption Doctrine in the Supreme Court, 87 Harv.L.Rev. 1534 (1974).

suit against the negligent member of the Commission for damages would satisfy federal due process. The Logan court concluded that such a remedy was insufficient. Logan, at 435, 36 The situation is worse here because the Illinois Appellate Court is immune from suit under Illinois law. See, e.g., Stump v. Sparkman, 435 U.S. 349 (1978). Thus, there is no apparent possibility for a "post-deprivation" hearing.

III

The Appellate Court's Refusal To Give Consolidated A Hearing On The Question Of Service On Consolidated Of Marcus' Notice Of Appeal Denied Consolidated Equal Protection Of The Laws, When Illinois Law Provides For A Hearing Upon Rebuttal Of A Presumption Of Service By Mailing.

Service through the mail involves at least two important steps: 1) the actual placing of the letter containing the materials in the U.S. Mail and 2) the U.S. Mail actually delivering the letter to the recipient. The first step, of course,

involves the sincerity of the affiant claiming to have deposited the letter in the mail. In this case, the affiant is the secretary of an attorney whose interest in the case exceeds a strict professional relationship. It also involves the routine practice of a law firm.[8] The second step involves the reliability of the U.S. Mail itself. See, in this regard, Justice O'Conner's remarks in Greene v. Lindsey, 456 U.S. 444 (1982).

Illinois procedural law appears to recognize these problems. Thus, if a letter is deposited in the U.S. Mail, the letter is rebuttably presumed to be received. M.S. Kaplan Co. v. Cullerton, 49 Ill.App. 3d 374 (1977). This presumption is rebutted by a denial of receipt. Liquorama, Inc., v. American National Bank & Trust Co. of Chicago, 86 Ill.App. 3d 974 (1980). In this

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[8] For example, does a secretary who states she deposited the letter in the mail actually do so or does the secretary simply place the letter in an "out box," from which the letter is later removed by mail room personnel? In other words, is the actual depositing done by a non-affiant?

case, Consolidated denied receipt of Marcus' notice of appeal. Once the presumption of receipt is rebutted, the presumption is gone and the question of receipt is an issue for the trier of fact. Liquorama, above; City of Chicago v. Supreme Sav. & Loan Ass'n, 27 Ill.App.3d 589 (1975); and Freund v. Equitable Life Assur. Society, 41 Ill.App.2d 126 (1963), where the Illinois Supreme Court vacated a default judgment because of an "apparent loss in the mail of letter transmitting papers to defendant's office." All these cases show that under the case law of this State, Consolidated is entitled to a hearing on the issue of service.

Thus, as the state of the law of Illinois now stands, if an important question involving law and fact arises for the first time at the appellate level, as it did here with respect to service of Marcus' notice of appeal on Consolidated, no due process hearing is held, whereas if the same situation would have arisen at the trial level, a due process hearing

on service would have been held. Such a distinction violates equal protection, unless there is a "rational basis" for the different treatment. Schweiker v. Wilson, 450 U.S. 221, 230 (1981); Mathews v. Lucas, 427 U.S. 495, 510 (1976); Logan, at 439.

Does the fact that the Illinois cases cited above involved a service problem at the trial level, whereas the service problem in this case arose for the first time at the appellate level, have federal constitutional significance? Consolidated believes not, because 1) the question of service with respect to filing a cross-appeal to protect property interests protected by the Due Process Clause is of equal importance to protecting similar property interests at the trial level, thus the amounts at stake are the same; 2) Illinois Supreme Court Rules 11 and 12 govern service in both the trial and appellate courts, thus the applicable rule is the same; and 3) the Appellate Court, in holding that "service upon Gorby was complete

..." (Slip Opinion, at 5 & 6), was acting as the functional equivalent of a trial court in making this factual determination, thus the role of the court on the issue of service is the same.

As has often been said, equal protection does not tolerate distinctions without a difference. Thus, any "appellate/trial level" classificatory scheme must "rationally advanc[e] a reasonable and identifiable governmental objective." Schweiker, at 235, quoted in Logan, at 439. The Illinois scheme furthers this equal protection violation. Thus, it is not compatible with the decisions of this Court and ought to be reviewed. U.S.S.Ct.Rule 10, 28 U.S.C.A.

I V

The Denial of Appellate Review By The Illinois Supreme Court Violated Consolidated's Rights Under The Due Process Clause Of The Fourteenth Amendment Which Guarantees Consolidated An Appeal Of A Judicial Decision Which Deprives Consolidated Of A Protected Property Interest.

Members of this Court have suggested on several occasions, always in *obiter dicta* and in plurality opinions or dissent, that a state is not required to provide appellate review. See, for example, the following cases: McKane v. Durston, 153 U.S. 684, 687-88 (1894), a case involving a right to bail pending appeal, where this Court noted in dictum that "a state is not required to provide appellate courts or a right to appellate review at all"; Griffin v. Illinois, 351 U.S. 12 (1956), a case involving free transcripts on appeal for indigents, where Justice Black, writing for four judges, remarked that "it is true that a State is not required by the federal constitution to provide appellate courts or a right to appellate review at all"; Douglas v. California, 372 U.S. 353 (1963), involving assistance of counsel on appeal, where Justice Harlan wrote in dissent that "appellate review is in itself not required by the Fourteenth Amendment," citing McKane v. Durston; and finally Ross v. Moffitt, 417 U.S.

600 (1974), where Justice Rehnquist, in holding that the states need not appoint counsel for indigents in discretionary second appeals (as opposed to a first appeal as of right), wrote that "it is clear that the state need not provide any appeal at all."

All of these judicial statements about there being no due process right to appellate review were made in a case in which there was a state right to appeal. In other words, these statements are incidental observations. They are also directly traceable to McKane v. Durston, an 1894 case which did not directly involving the issue of a due process right to appeal. And thus, as best as Consolidated can determine, this Court has never held that due process does not require a state to provide an opportunity for appellate review of a judicial decision which deprives a person of life, liberty or property.

All the great developments in due process theory have taken place since McKane. The

revival of substantive due process after the Slaughter-House Cases, 83 U.S. 36, decision in 1873 did not begin until Allgeyer v. State of Louisiana, 165 U.S. 578 (1897) and Lochner v. New York, 198 U.S. 45 (1905). The classic "fundamental fairness" approach to due process truly began in Twining v. New Jersey, 211 U.S. 78 (1908), was developed in Palko v. Connecticut, 302 U.S. 319 (1937) and has been employed by this Court without exception in all significant due process decisions since Palko. See, for example, Adamson v. California, 332 U.S. 46 (1947); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113(1973) and most recently in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. -- - (1992). This theory of due process is neither static nor historically or finally fixed, but rather is flexible and focuses attention on whether the right is "fundamental to the American scheme of justice," (Duncan v. State of Louisiana, at 149); is "implicit in the concept

of ordered liberty" or is "of the essence of a scheme of order liberty." Palko v. Connecticut, at 325. As Justice Powell put it in Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404, " ... the focus is, as it should be, on the fundamentality of that element viewed in the context of the basic Anglo-American jurisprudential system common to the states." 406 U.S. at 372, n.9. As Justice Frankfurter, speaking for the Court in Rochin v. California, 342 U.S. 165 (1952), put it:

In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims ... on a judgment not ad hoc and episodic but duly mindful of reconciling the needs of both continuity and of change in a progressive society.
Emphasis added.

It is nearly impossible to imagine an important legal and factual decision of a court in the United States being immune from some

form of appellate review. As Justice Black wrote in Griffin v. Illinois: "All of the States now provide some method of appeal from criminal convictions, recognizing the adjudication of guilt or innocence." Griffin, at 18. This Court should take cognizance of the fact that such review is not limited to criminal cases, but rather extends to all cases in which a persons' liberty or property interests are implicated."

One should conclude that, across the land, in every state, the American people expect a judicial decision which is important to the outcome of a case to be subject to higher court appellate review. As Professors James and Hazard wrote: "... in all jurisdictions appellate review is generally available in some form from judgments of trial courts." James & Hazard, Civil Procedure 3rd Ed (1985), at 661. This is no longer an era of unreviewable decision making and unlimited discretion of judges. In short, judicial decisions involving

possible serious error of law or fact must be deemed fundamental to the American scheme of justice. As Justice Brennan wrote in dissent in Jones v. Barnes, 463 U.S. 745 (1983):

The Court surprisingly announces that 'there is, of course, no constitutional right to appeal.' ... That statement, besides being unnecessary to its decision, is quite arguably wrong. ... If the question were to come before us in a proper case, I have little doubt that the passage of 30 years since Griffin and some 90 years since McKane v. Durston ... would lead us to reassess [the bases of the Court's earlier decisions]. There are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a person's liberty or property. ...
Jones, at 756-757.

Although today appellate review of a judicial decision of any court in the United States involving an important legal and factual question is both the norm and expectation of the American people, Consolidated was denied such a review in this case. The Illinois

Appellate Court was the first court to deal with the issue of service on Consolidated of Marcus' notice of appeal. When the Appellate Court held, contrary to established Illinois case law, that it could not hold a hearing on service on Consolidated because of lack of jurisdiction, Consolidated petitioned the Illinois Supreme Court for leave to appeal as a matter of right or leave to appeal. By denying Consolidated's petition, the Illinois Supreme Court deprived Consolidated of any appellate review of a lower court decision which was adverse to Consolidated's property interests.

This case thus provides this Court with a proper case and occasion to determine the constitutional validity of the McKane case and to consider the right to appeal from the perspective of American notions of fundamental fairness in the late 20th Century.

V

The Denial Of Appellate Review By The Illinois Supreme Court Denied

Consolidated Equal Protection Of The Laws.

The Illinois Constitution, Article 6, §6, and Illinois Supreme Court Rule 301 guarantee a right to appeal from a final judgment of a circuit court. Section 4 of Article 6 guarantees, as a matter of right, an appeal from the Appellate Court to the Supreme Court in situations in which a constitutional question arises for the first time in the Appellate Court. Thus, Illinois law provides, nearly across board, a right to appellate review of a judicial decision involving serious questions of law and fact. But there was no appeal allowed in this case, no review of the Appellate Court's refusal to hold a hearing on service on Consolidated, no review of the Appellate Court's dismissal of Consolidated's cross-appeal for want of jurisdiction. The situation presented here is such that nearly every litigant in Illinois courts enjoys a right under the Illinois scheme of appellate procedure to an appellate review of a

judicial decision which deprives the litigant of life, liberty or property. As matters worked out, only a litigant in Consolidated's position is denied an appeal.

Had the denial of a hearing on service occurred in the trial court, there would have been a right and an opportunity for review under the Illinois appellate/procedural scheme. But, since this question of fact and law arose for the first time in the appellate court, there is no review. This denies Consolidated equal protection of the laws, because there is no rational basis for distinguishing between appeals from final judgments in the trial court involving important questions of law and fact and final judgments of the appellate court involving identical issues. Cf. Schweiker v. Wilson, 450 U.S. 221 (1981)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Illinois, First District.

PRAYER

The Petitioner Consolidated Chemical Works, Incorporated, (Consolidated) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District, entered in this proceeding on April 1, 1993.

Respectfully submitted,

John D. Gorby
Counsel for Petitioner Consolidated Chemical Works, Inc.
315 South Plymouth Court
Chicago, IL 60604
312/427-2737

June 10, 1993

APPENDICES:

1. Opinion and Judgment of the Appellate Court of Illinois

2. Appellate Court's Denial of Petition for Rehearing

3. Supreme Court's Denial of Leave to Appeal as of Right or Alternatively Leave to Appeal

Appendix #1

FOURTH DIVISION
September 24, 1992

No. 1-90-3669

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLES GAS, LIGHT AND COKE COMPANY,	)	
Plaintiff,	)	
v.	)	Appeal from
	)	the Circuit Court
Guadalupe Varela,	)	of Cook County.
Defendant.	)	No.86-M108168
and	)	Honorable
	)	Glynn J. Elliot, Jr.
CONSOLIDATED CHEMICAL WORKS,	)	Judge Presiding
Garnishee-Defendant/Cross-Appellant,	)	
v.	)	
LEANRD MARCUS, ESQ.,	)	
Cross-Appellee.	)	

ORDER

This is the second time this cause comes before us concerning the adequacy of attorney fees awarded pursuant to section 12-817 of the Code of Civil Procedures, which provides that upon the wrongful issuance of a garnishment summons, the person who wrongfully issues the summons shall be liable "for all damages occasioned by such action including reasonable attorney's fees ***." Ill. Rev. Stat. 1989, ch. 110, par. 12-817.

On November 13, 1989, this court issued an order pursuant to Supreme Court Rule 23 (134 Ill, 2d R, 23) affirming trial court judgments in the amount of $100 in favor of the garnishee-defendant Consolidated Chemical Works (Consolidated) and in the amount of $900 in favor of Consolidated's attorney John D. Gorby. The judgments were against Lenard Marcus, the attorney representing Peoples Gas who caused the wage garnishment summons to issue. Subsequent to this court's order, Gorby returned to the trial court seeking attorney fees incurred by Consolidated on appeal. On November 19, 1990, the trial court entered a judgment in favor of

Consolidated and against Marcus in the amount of $6,500. On December 11, 1990, Consolidated filed a "Motion for Clarification or Alternatively for Reconsideration" directed against an earlier judgment of the trial court, entered on September 26, 1990, which denied Consolidated's motion for fees against Baker & Miller, Marcus' law firm. The motion for clarification was withdrawn by Consolidated on December 18, 1990.

On December 19, 1990, Marcus filed a notice of appeal from the trial court's judgment of November 19, 1990. On February 19, 1991, Consolidated filed a motion for leave to file a late notice of cross-appeal. In support of the motion, Consolidated's attorney Gorby stated that he did not receive notice of Marcus' appeal until February 11, 1991. Gorby further stated that "(a) review of the documents in this Appellate Court and in the trial court contain no record of any service or proof of service of a Notice of Appeal in this case***.

Marcus filed an objection to Consolidated's motion for leave to file a late notice of cross-appeal. In the objection, Marcus stated that the notice of appeal, accompanied by a notarized proof of service, was filed in the trial court on December 19, 1990. Marcus stated that the notice of appeal was served upon Gorby on

that same day. The record contains a copy of Marcus' notice of appeal and the notarized proof of service. The notice of appeal bears the stamp of the circuit court clerk showing that it was filed at 2:44 p.m. on December 19, 1990. Marcus also stated in his objection that he filed and served the docketing statement upon Gorby on December 30, 1990. The docketing statement, the notice of filing the docketing statement and the notarized proof of service were attached as-exhibits to Marcus' objection. On February 28, 1991, this court denied Consolidated's motion for leave to file a late notice o cross-appeal.

Consolidated filed a motion for reconsideration in which Gorby again stated that he had not received notice of Marcus' appeal. Gorby stated that "the Circuit Clerk's office, as of February 19, 1991, had no record of any notice of appeal having been filed either in the court file, which she could not locate, or on any computer records." A computer print-out of the circuit court record was attached to the motion. There was no indication of a notice of appeal. Gorby stated that no harm would be suffered by Marcus by allowing the cross-appeal because this court "already has jurisdiction over this case and the parties by virtue of Marcus' appeal***." On March 1, 1991, this court allowed the motion for

reconsideration and granted leave to file the late notice of cross-appeal. Marcus then voluntarily dismissed his appeal, leaving only Consolidated's cross-appeal before this court.

Consolidated contends on appeal that the trial court abused its discretion in awarding an inadequate amount of attorney fees and that the court erred in entering the judgment solely against Marcus. Marcus responds that this court is without jurisdiction in this matter because Consolidated's notice of cross-appeal was not timely filed. Consolidated's only response to the issue of jurisdiction is that it was resolved when this court allowed the filing of the late notice of cross-appeal.

The timely filing of a notice of appeal is jurisdictional. (In re Application of County Treasurer (1990), 208 Ill. App. 3d 561, 564, 567 N.E.2d 486.) The same is true with respect to the filing of a cross-appeal. (Case International Co. v. American National Bank & Trust Co. (1974), 18 Ill. App. 3d 297, 300, 309 N.E.2d 750.) A reviewing court has the duty to consider its jurisdiction and to dismiss the appeal if it determines that jurisdiction is wanting. Archer Daniels Midland Co. v. Barth (1984), 103 Ill. 2d 536, 53j9, 470 N.E.2d 290.

Supreme Court Rule 303(a) (1) states that a notice of appeal must be filed with the clerk of the circuit court within 30 days after entry of the final judgment appealed from, or within 30 days after entry of an order disposing of the last pending timely filed post-trial motion. (134 Ill. 2d R. 303(a) (1).) Rule 303 (a) (3) provides that "[i]f a timely notice of appeal is filed and served by a party, any other party, within 10 days after service upon him, or within 30 days of the entry of the order disposing of the last pending post-trail motion, whichever is later, may *** cross-appeal by filing a notice of appeal ***." (134 Ill. 2d R. 303(a) (3).) Rule 303(e) provides that "[o]n motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and *** filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal ***." (134 Ill. 2d R. 303(e).) In Local 799, American Federation of State, County and Municipal Employees v. Henkhaus (1980), 88 Ill. App. 3d 1034, 411 N.E.2d 68, this court held that the provisions of Supreme Court Rule 303(e) are jurisdictional and that a reviewing court is without jurisdiction to entertain a motion for leave to file a

late notice of appeal where the motion is filed beyond the prescribed 30-day extension.

In the case at bar, the judgment appealed from was entered on November 19, 1990. The record shows that Marcus filed his notice of appeal on December 19, 1990. Although Gorby argues on appeal that Marcus' notice of appeal was not filed in the circuit court and that Gorby was not served with the notice, the record contains a copy of the notice of appeal stamped "Filed" by the circuit court clerk on December 19, 1990. The notice of appeal is accompanied by a notarized proof of service indicating that Gorby was served by mail on that same day. Supreme Court Rules 303(d) and 11 provide that a notice of appeal may be served by mail and that service by mail is complete four days after mailing. (134 Ill. 2d Rules 303(d), 11.) Thus, service upon Gorby was complete on December 23, 1990. He was required to file his notice of cross-appeal within 10 days, which would have been January 2, 1991. Supreme Court Rule 303(e) would have allowed him to file a motion for an extension of time within 30 days of January 2, 1991, which would have been February 1, 1991. The motion for leave to file a late notice of cross-appeal was not filed until February 19, 1991. In light of these facts, we believe that Gorby's motion for

leave to file a late notice of cross-appeal was improvidently allowed. Based upon the Supreme Court Rules cited above and this court's holding in Henkhaus, it is our opinion that we lack jurisdiction over Consolidated's cross-appeal.

In its motion for reconsideration of our earlier determination to deny leave to file a late notice of cross-appeal, Consolidated argued without citation of authority that its motion for clarification in the trial court served to extend the time for filing the notice of cross-appeal. As stated above, this motion was withdrawn on December 18, 1990. Marcus, citing Richey Manufacturing Co. v. Mercantile National Bank of Chicago (1976), 40 Ill. App. 3d 923, 353 N.E.2d 123, argues that a post-trial motion that is withdrawn does not serve to extend the time for filing an appeal. Even if we were to accept Consolidated's argument, the last day to file a timely appeal would have been January 16, 1991.

Consolidated would then have had 30 days, until February 15, 1991, in which to avail itself of the "reasonable excuse" extension provided for in Supreme Court Rule 303(e). Consolidated's motion for leave to file a late notice of cross-appeal was not filed until February 19, 1991.

Accordingly, Consolidated's cross-appeal is dismissed for lack of jurisdiction.

Appeal dismissed.

Jiganti, P.J., with Johnson and McMorrow, JJ., concurring.

Appendix #2

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLES GAS, LIGHT AND COKE COMPANY	)	
Plaintiff,	)	
v.	)	
GUADALUPE VARELA,	)	
Defendant,	)	
and	)	
CONSOLIDATED CHEMICAL WORKS,	)	No. 1-90-3669
Garnishee-Defendant/Cross-Appellant,	)	
v.	)	
LENARD MARCUS, ESQ.	)	
Cross-Appellee	)	

ORDER

This cause coming to be heard on the Petition for Rehearing of the Garnishee-Defendant/Cross-Appellant, CONSOLIDATED CHEMICAL WORKS, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Petition for Rehearing be denied.

DATED at Chicago, Illinois, this 2nd. day of December, 1992.

Appendix #3

74839

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

MARCH 31, 1993

Mr. John D. Gorby
Attorney at Law
315 South Plymouth Court
Chicago, IL 60604

No. 74839 - The Peoples Gas, Light and Coke Company et al., respondents, v. Guadalupe Varela, respondent (Consolidated Chemical Works, petitioner). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

McMorrow, J., took no part.

The mandate of this Court will issue to the Appellate Court on April 22, 1993.